

Unto the Right Honourable, The Lords of Council and Session,

The PETITION of Mark Carse of Cockpen, and
Mr. Patrick Middleton his Assigney, *Calder-*
wood of Pitheadie, John Bortwick of Cruikstaton, Hugh
Fleming, Son to Mr. John Fleming Advocate, and the
other Creditors of *Thomas Calderwood*

HUMBLY SHEWETH,

THAT Sir James Cockburn of Ryflaw being under great Debts, particularly one of L. 30000, due to *Alexander Martine* by heritable Bond and Infeftment, which was adjudged by several Creditors of the said *Martine*; and thereupon, and upon the other Diligences at the Instance of the other Creditors of Sir James Cockburn, there was a Ranking and Sale of the said Sir James his Estate; and *Thomas Calderwood*, who had acquired the whole Debts that were ranked, became Purchaser at the Sale as the highest Bidder.

The said *Thomas Calderwood* thereafter disposed the Estate to *Trotter of Mortounhall*, who paid up a great Part of the Price, but there is yet resting the Sum of L. 26000, with several Years Annualrents, which *Trotter of Mortounhall* retains upon Pretence that several Incumbrances are not purged, a Right to the Teinds not purged and conveyed to him, nor a Progress made up in the Terms of the Qualities contained in his Bond.

Sir William Cockburn having purchas'd an Adjudication led by Doctor Hay as a Creditor of *Martine's* in the Year 1693, has raised Process against *Mortounhall*, as have likewise the Creditors of *Thomas Calderwood*, to whom *Mortounhall's* Bond for the Remains of the Price is granted; and *Mortounhall* having insisted in a Nullity of the said Adjudication, and produced for Sir William Cockburn; that the Adjudication whereon he founds his Interest, is null, in respect it proceeds upon a Decree of Constitution, wherein the passive Title is a general Charge to enter Heir, and the Executions of that general Charge are not now produced.

2do, The Decree of Adjudication proceeds against *John Martine*, as specially charged to enter Heir to *Alexander Martine* his Predecessor, and there is no special Charge or Execution thereof produced.

It was answered for Sir William Cockburn, That by the constant Practick, there was no Necessity for producing of general or special Charge after Twenty Years, these being Warrants which are not usually taken up from the Clerk, and so the Party Adjudger is not answerable for them: Your Lordships upon this Debate, by an Interlocutor the 26th November, have found, *That the Want of the Executions of the general and special Charge after Twenty Years, is no Nullity nor Ground of Reduction.*

Your Petitioners beg Leave to reclaim, and observe in the First Place, That the Interlocutor presupposes, that within the Twenty Years the Want of the general and special Charge, is a Nullity and Ground of Reduction of the Adjudication, proceeding upon such pretended Diligence, and we know of no Statute or Act of Session which renders this no Nullity after Twenty Years, which was a Nullity before. 2do, Such Executions are never left with the Clerks as a Warrant of the Process; and therefore supposing there was any such Practise of Court, as our Competitor pretends to, that Parties should not produce their Warrants of Process usually left with the Clerks, after Twenty Years from the Date of their Decrees, this would be of no Service in the present Case; the Executions of Summons and Libels, whereupon Decrees proceed, are indeed left with the Clerks, as Warrants of Process, whereupon the Decrees come to be extracted, but a general and special Charge are not of this Nature; they are brought by the Pursuer in *modum probationis* of his *medium contendendi*, and so are of the same Nature with the Instruction of Debt whereupon the Libel proceeds, and therefore are taken up from the Clerks as much as Bonds and Bills, and ought to be preserved for Re-production, in case of Quarrel, as well as the other.

If

If the Pursuer of a Decreet of Constitution, instead of concluding his Libel upon a general Charge to enter Heir, should found his passive Title upon a Testament confirmed by the Defender, or a general Retour, or other probative Instruction under the Defender's Hand, of one or other of the passive Titles, such as Behaviour by Intromission with the Rents, and should produce and recite these or any of them *in modum probationis* of the passive Titles: This is as much an Instruction of the Libel as a Ground of Debt, and therefore the only Time which excludes the Production of the one, that is the Course of Prescription for Forty Years, ought to exclude the other, and no shorter; for there can be no Reason assigned why a shorter Time ought to be allowed for the Proof and Maintenance of one Part of a Libel, whereupon a Decreet proceeds, whether that be the Subsumption or *medium contendendi*, than of the other.

And, it is a Mistake, That the other Proofs of the *medium contendendi*, are taken up by the other Party, but general or special Charges are not; for your Petitioners do maintain, That general and special Charges are always taken up from the Clerk with the other Grounds of Process, and the Clerks cannot, nor do they refuse to give them up to the Party Prosecutor, as well as Bonds, Bills or Tickets: And for Evidence of this, your Petitioners appeal to the constant Practice of the Court of Session.

And whereas 'tis pretended, *That there's no Difference betwixt an Execution of a Summons whereupon a Decreet proceeds, and the Execution of a general or special Charge, for the Decreet proceeds upon the one as well as upon the other, and that both in Executions and other minute Writs, which are apt to fall by.*

It is answered, That if this Reason proves any Thing it proves too much; for Decrees likewise proceed upon Bonds, Bills, and Tickets, and other minute Writs, which therefore ought none of them to be produced after Twenty Years, and yet *ex concessis* the Want of any of these, even after Twenty Years, would be a Nullity; but the material Difference in our Forms is this, that whatever is marked in the Production of the Decreet, as produced by the Pursuer or Defender, that is reckoned the Grounds of the Decreet; and after Decreet is extracted, either Party gets up the same upon their Receipts, whereas the Execution of the Summons are never marked in the Production; all that the Decreet mentions touching them is, *and auct the Charge*, and the Clerk is answerable for these Executions, which is the Warrant of the Procedure upon the Summons against the Defender, and they must remain with him as the Warrant of a Decreet; but the general and special Charges, with the Executions, are always marked in the Production, and bears to be so here in the same Manner with the Bond, which was the Instruction of Debt; and if ever any such Executions did exist, they surely have been got up with the Bond, and general and special Charge, and ought to be reproduced under the same Certification.

'Tis true indeed, tho' our Practick has made no Difference 'twixt the general and special Charge, and that therefore the Want of the one as well as the other, ought to be sustained as a Nullity, yet this Nullity operates much stronger in the Case of the Want of the Executions of the special Charge; for a Decreet of Constitution may subsist without a general Charge, the Party may be held as consert upon the passive Titles; or if he compares, and propones a peremptor Defence, Decreet may pass; and in such Cases, especially where there is Compareance *omnia presumuntur solenniter acta*, for such Steps of the Procedure, as of their own Nature require no Instruction, must be credited upon the Faith of the Clerk, and other Members *curie*; but a Decreet of Adjudication against the Predecessor's Estate, for the Debt of the apparent Heir, can never subsist without the Execution of the special Charge against that apparent Heir.

For by the Act of Parliament introducing special Charges, the special Charge is made a Midcouple in the Transmission of Land Rights, as much as a special Service and Retour, and Infestment thereon; and so the Stile of the special Charge to this Day is charging the Debitor to enter Heir, with Certification if he enters not, the Creditor shall have such Process and Execution against that Land and Heritage to which he might enter, as if he were actually entered therein; and if an Adjudication proceeding against the Debitor and his Lands, did libel that he had Right thereto in virtue of the Retour and Infestment, or an Infestment upon a Precept of *clare constat* from the Superior, that Adjudication would be good without any special Charge, pro-

providing in a Competition the Adjudger did instruct, that his Debtor was actually served Heir, or Insest upon a Precept; but this be behoved necessarily to instruct in Support of his Adjudication, otherwise in Competition with the Creditors of the Predecessor, or others having Right, the Adjudication would be found void; and why the special Charge, which comes in place of the Insestment upon a Retour or Precept, ought not to be produced in order to vouch this Fact of the Debtor's Entry, or that which the Law has made equivalent to his Entry is not easily to be conceived.

It is a common Brocard *furrogatum sapit naturam surrogati*; and if in a Competition its necessary to instruct the Debtor to be insest; by the same Reason ought the special Charge to be instructed, where he was not insest; and this Solemnity of the special Charge being necessary, in order to make up a Part of the Conveyance of a real Right, in which our Law is nice, it can no more be dispensed with than the Service itself.

Nor can the general Presumption, that *omnia solemniter acta*, free the Pursuer from the Necessity of producing the general or special Charges; for that, if that Rule was admitted to save against Production, there would be an End of producing either Grounds or Warrants, and the Rule in Law must the rather take Place, *non creditur referenti*, and so is indeed continual Practice. Beside the general and special Charges are no Parts of the Solemnities in the Adings before the Judge; these are execute extrajudicially, and without the Judge's Warrant, and therefore cannot be considered as *solemniter acta*; and there is so far from being just Reason to admit the Rule universally, that 'tis perfectly well known in Processes of Adjudication, especially such as the present, which is not the first; there is nothing at all produced before the Judge, but the simple Summons of Adjudication and Executions, because no Body can be admitted to object; and the Productions, if any is, thereafter made betwixt the Clerk and Extraider, which last commonly makes the Production according to his Employer's Desire, very oft of Writs which he never saw, and for his own Security takes his Employer's Receipt; so that the Rule here of *solemniter acta* cannot apply.

It was alledged for Sir William, *That since Retours after Twenty Years are by Act of Parliament irreducible, the special Charges and Executions thereof, by Law supplies the Want thereof, cannot be quarrelled after that Space.* To this is answered, *imo*, That the special Charge and Executions not only supplies the Want of a special Retour, but also of an Insestment thereon; and 'tis not pretended, but the Insestment is quarrelable after the Twenty Years. *2do*, *Tho' Retours are not reducible upon Fullhood after Twenty Years*, yet even after that Time, these as well as the Insestments thereon, must be produced, not only as the Title to pursue, but also to instruct, That they are done in the Manner prescribed by Law; and if upon Production, any intrinsic Nullity appear, there is no question but that Nullity could be proponed, even after the Twenty Years. Your Petitioners shall only notice, how nice our Law is in the Transmission of Land-Rights, in that it required a special Act of Parliament to save the Production, even of Instruments of Resignation after Forty Years, tho' these Instruments be recited in the Charter and subsequent Insestments.

But then in the next Place, whatever come of this general Point, your Petitioners humbly conceive, That our Competitor cannot subsume in the Terms of the Interlocutor, because of the Specialities which our Procurators urged from the Bar, and upon which your Lordships have pronounced no Interlocutor; and that is, That it appears the Executions of this General and Special Charges were wanting within the twenty Years, for the Decreet of Constitution and Adjudication, at Sir *David Hay's* Instance, to which Sir William has Right, are in the 1692; and in the 1695 several other Creditors, who had likewise adjudged, carried on a Process of Ranking and Sale of the common Debtors Estate, wherein Sir *David Hay*, in whose Person this Diligence then stood, is duly called; and in Obedience to his Citation, there is a Compearance for him by his Procurator, who takes a Day, as the Procurators of the rest of the Creditors likewise did, to produce their several Interests, and to depone upon the Verity of their Debts; and after several Prorogations, the rest of the Creditors do produce and depone upon the Verity of their Debt; but Sir *David* neither produced nor deponed, and the Term stands fairly circumduced against him; after which, the

Ranking

Ranking of the several Creditors, according to their respective Interests produced, goes on, and at length, comes to be extracted, all which appears from the Decreet lying in the Clerk's Hands; so that Sir *William*, as deriving Right from Sir *David*, must plead as at the Time of the Dependence of this Proceſs wherunto his Author was called, and this being within the twenty Years, the Production of the Executions of the general and special Charge are necessary; for he cannot be in a better Case than if he had then appeared when called; and if it was otherways, Parties who are sensible of the Lameness of their Diligences might fail to appear, or having appeared, might withdraw till twenty Years were elapsed, and so cover the Defects of their Diligence by their own Fault or Neglect, which surely can never be allowed of.

Especially considering, That Sir *William*, as coming in the Place of Sir *David*, cannot indeed be in so good a Case he might have been in, had he produced when he appeared by his Procurators in the depending Proceſs; for now he is excluded by a Circumduction of the Term against his Author, not only for not Production, but for not deponing upon the Verity of the Debt, and so he falls to insist for being reponed against this Decreet before he can be heard; and he cannot now be reponed, because his Author is dead.

When these Objections were first insisted on, it was alledged for Sir *William*, That Sir *David* his Author was dead when the Proceſs was raised; but upon Information, this happens to be a Mistake, Sir *David* having been alive at the Time of the pleading in this Decreet, as appears by his Procurator's Appearance for him, and was alive for eighteen Months after the Circumduction against him, for not producing and deponing, which was in November 1697, as appears by the Disposition in Proceſs by him to *Drummelzeor*, founded upon by Sir *William*, which is dated in March 1699.

Sir *William* pleaded the Hardship of being cut off from so great a Debt, by such casual Loss: But, *imo*. It is not very certain whether Doctor *Hay's* be a just Debt or not; the Presumption is indeed against it, that it is not the Term being circumduced against the Doctor in his own Life, for not deponing upon its Verity; and after that Circumduction, their being a Decreet extracted in the Ranking, it may seem to be *res judicata* as to those concerned in that Ranking against that Debt. But *2do*. Supposing it a just Debt, yet the Creditors of Mr. *Calderwood* are in *damno citando* as well as Sir *William Ockburn*; for tho' his Debt should not be admitted, yet they will not draw Half their Sums, and therefore have very just Reason to except upon any Informalities or Defects in Sir *William's* Diligence, to debar him from further straitning the Fund of their Payment: And as Sir *William* is here the Pursuer, he ought to come with a very compleat Right, before he be allowed to quarrel a solemn Decreet of Ranking.

May it therefore please your Lordships to re-consider your former Interlocutor, and to find, That the Executions of the general and special Charge, not being the Warrant of Proceſs, which are necessarily retained by the Clerk, but the Proof of the medium contentendi in the one, and admitted of for transmitting of the Proerty of the Land-Right in the other, and as such always marked in the Productions of the Decreet, as well as the other Grounds of Debt, and Vouchers of other Parts of the Libel, the want of such Executions, tho' after twenty Years, is a Nullity and Ground of Reduction: At least, 2do. to find, That in this Case, where our Competitor's Author was called, and appearing in a Proceſs of Competition, which, in our Law, is the same with mutual Reductions; and the Term being circumduced against him, for not producing and deponing on the Verity of the Debt, he stands excluded: At least, 3tio. That he must dispute as at the Time of the Dependence of the said Ranking, when he ought to have produced, and when the want of his Executions would have been a Nullity; and consequently, that the want of them now is a Nullity.

According to Justice, &c.

J. A. GRAHAM.